IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. M. DUNGAN and EUNICE DUNGAN, His Wife,
Appellants,

vs.

POTLATCH LUMBER COMPANY, a Corporation,
Appellee.

No. 6166.

APPELLANTS' BRIEF

On Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

O. C. MOORE
and
BRUCE BLAKE,
Office and P. O. Address,
Spokane, Washington,
Attorneys for Appellants.

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STATEMENT

This action was brought by appellants to recover from appellee a balance of $15,308.21, with interest from August 12, 1928, due on a lumber contract, a copy of which is attached to the complaint (Rec. p. 4).

By the terms of the contract appellants agreed to cut, saw into lumber and deliver to appellee, at Elk River, Idaho, all the merchantable White Pine timber upon certain described lands

> "* * * which will cut to Grade No. 3 Common or better, rough Idaho White Pine lumber; provided, that Grade No. 3 Common shall not exceed 25% of the total cut and delivery."

For the lumber to be so cut and delivered,

> "Second party agrees to pay and the first parties agree to accept for said lumber Thirty-two and 50/100 Dollars (32.50) per thousand feet, board measure."

As a guarantee against labor liens, fire loss, etc., $1.00 from each thousand feet purchase price was to be temporarily retained by appellee, and with respect to the balance,

> "Second party shall pay Thirty-one and 50/100 Dollars ($31.50) per thousand feet, board measure, for such lumber as shall have been delivered during the preceding calendar month, as herein specified, according to the scale bill rendered by the scaler or grader as herein provided, such pay-

> ment of Thirty-one and 50/100 Dollars ($31.50) per thousand feet, board measure, to be made monthly on or before the eighth day of the calendar month following delivery."

The contract stipulates for the scaling and grading of the lumber by a scaler or grader furnished by appellee.

> "Said grader or scaler shall inspect and grade all lumber covered by this contract * * * It is further agreed that the scale and accounts rendered by such grader or scaler shall be final and binding upon each of the parties to this contract * * * ."

The contract also provides,

> "First parties (appellants) further agree to remove from the lumber yard of the party of the second part, at their own cost and expense, and within a reasonable time, not exceeding seven days from date of rejection by grader, all lumber which is not up to grade or in accordance with the specifications as herein specified and is, therefore, rejected by the second party. *Rejection shall be deemed automatically made by second party at time of grading.*" (Italics ours.)

An affirmative answer and counterclaim was interposed (Rec. p. 22) to which a demurrer on the ground of insufficiency of facts was overruled (Rec. p. 27), while by the same order a motion to strike was granted as to paragraphs 2, 3, and 5, and denied as to paragraph 4.

The remaining paragraphs of the affirmative answer and counterclaim, to which a reply was interposed (Rec. p. 28), allege: Paragraph 1, the execution of the contract set up in the complaint: Paragraph 4, in *haec verba* the above quoted provision of the contract that No. 3 Common lumber shall not be in excess of 25% of the total cut and delivery, likewise the language of the contract estimating the timber to be cut at 9,000,000 feet: Paragraph 6, that the total cut delivered to defendant was 6,857,307 feet, of which 2,299,971 feet was No. 3 Common and 4,557,336 feet was better than No. 3 Common, and that the excess of No. 3 Common delivered was 780,851 feet: Paragraph 7, that the deliveries of lumber were between August, 1926, and the 15th day of August, 1928; that the total deliveries were 2,142,693 feet less than the estimated amount; that plaintiffs did not know until after the last delivery of the alleged excess of No. 3 Common lumber, and that thereafter, on September 18, 1928, written notice was given to appellants of the alleged excess of No. 3 Common above the 25% provided in the contract, also that a second notice was given to appellants on October 13, 1928: Paragraph 8, that No. 3 Common White Pine lumber is an inferior grade, of less value than that specified in the contract; that the market value thereof during the period of

said contract at place of delivery was not in excess of $13.50 per thousand feet, and that by reason of such excess of No. 3 Common defendant was damaged in the sum of $14,930.02.

Pursuant to a stipulation in writing trial was had to the court without a jury (Rec. p. 32).

It is undisputed, and the court found (Spec. Find. I, Rec. p. 35), that 6,857,307 feet of lumber was delivered, nor is it disputed that this constituted all the merchantable White Pine on the land. There were no rejections. Of the above total, it is admitted that 4,687,063 feet was delivered during the years 1926 and 1927 (Rec. p. 31), and that for the lumber so delivered appellee had fully paid, save and except that of the stipulated price, $32.50 per thousand feet, appellee, pursuant to the terms of the contract, withheld the sum of $1.00 per thousand feet as a guarantee for performance by appellants of the requirements of the laws of Idaho for the burning of brush on the lands from which the timber was cut and removed.

The delivery of lumber was completed in August, 1928 (Rec. p. 24, 29, 43), and appellants have been paid $59,911.78, leaving a balance due on the contract price of $15,308.21.

Appellee refused to pay this balance, claiming an

offset in the sum of $14,930.02 on account of the alleged delivery of Grade No. 3 Common, in excess of the 25% of the total quantity delivered (Appellee's Ans., Rec. p. 21, 26).

A motion to strike and a demurrer, directed to the affirmative allegations of the answer just noticed, were denied and overruled respectively (Rec. p. 27).

Subject to objection, on behalf of appellants, as incompetent, irrelevant and immaterial for the reason that appellees having received and accepted all of the lumber thereby waived all right to make complaint that there was an excess above 25% of Grade No. 3 Common (Rec. p. 45, 46), it was stipulated at the trial, for the purpose of shortening the record (Rec. p. 44), that witnesses on behalf of appellee would give testimony tending to establish the allegation of the answer that Grade No. 3 Common lumber exceeded 25% of the total cut and delivery, and that appellants had no evidence on the question.

Over like objection testimony, uncontroverted, was introduced on behalf of appellee to the effect that the market value of No. 3 Common White Pine lumber, during the three years of the performance of the contract ranged from $13.50 to $15.50 per thousand feet.

The court made special findings of fact, omitting formal parts, as follows (Rec. p. 35);

I.

"That the total amount of lumber delivered by plaintiffs to defendant under the contract alleged in the complaint and admitted by the answer was 6,857,307 feet board measure, Grade No. 3 common or better Rough Idaho White Pine Lumber.

II.

That, of the total amount of lumber so delivered by plaintiffs to defendant, 4,557,336 feet board measure was grade No. 3 Common Rough Idaho White Pine Lumber (31).

III.

That, of the total amount of lumber so delivered by plaintiffs to defendant, 4,557,336 feet board measure was of grades better than grade No. 3 Common Lumber.

IV.

That twenty-five per cent of the total amount of lumber cut and delivered by plaintiffs to defendant was 1,519,112 feet board measure.

V.

That plaintiffs delivered to defendant, and defendant received, 780,851 feet board measure of grade No. 3 Common Rough Idaho White Pine Lumber in excess of twenty-five per cent of the total amount of lumber cut and delivered.

VI.

That the excess of 780,851 feet of grade No. 3 Common Lumber was delivered as follows:

In the year 1926, 149,293 feet;
In the year 1927, 321,723 feet;
In the year 1928, 309, 843 feet.

VII.

That the market value of the excess of grade No. 3 Common Lumber at the place of delivery was as follows:

In the year 1926 the sum of $15.50 per thousand feet board measure;

In the year 1927 the sum of $14.50 per thousand feet board measure;

In the year 1928 the sum of $13.50 per thousand feet board measure.

VIII.

That the difference between the market value of the excess of grade No. 3 Common lumber delivered and the contract price is the sum of Fourteen Thousand Two Hundred and Sixteen and 02/100 ($14,216.02) Dollars.

IX.

That the defendant is entitled to set off against the (32) demand of the plaintiffs the said sum of Fourteen Thousand Two Hundred Sixteen and 02/100 ($14,216.02) Dollars under its counter-claim."

The following findings are incorporated in the judgment (Rec. p. 38):

"1. That plaintiffs are entitled to recover from

the defendant on the cause of action stated in their complaint the sum of Fifteen Thousand Three Hundred Eight and 21/100 ($15,308.21) Dollars.

2. That defendant is entitled to recover from the plaintiffs on its counterclaim the sum of Fourteen Thousand Two Hundred Sixteen and 02/100 ($14,216.02) Dollars, and that defendant is entitled to have said amount set off against the demand of plaintiffs.

3. That plaintiffs are entitled to recover judgment against the defendant for the sum of One Thousand Ninety-two and (34) 19/100 (1,092.19) Dollars, with interest thereon at the rate of Six (6%) per cent per annum from the 12th day of August, 1928, amounting to One Hundred and Four and 66/100 ($104.66) Dollars, aggregating the sum of One Thousand One Hundred Ninety-six and 85/100 ($1,196.85) Dollars, and their costs and disbursements herein expended, with interest on the judgment at the rate of six (6%) per cent per annum from the date hereof."

Exceptions were duly entered on behalf of appellant (Rec. p. 37) to special findings No. 2 to 9, inclusive, and likewise to general findings No. 2 and 3, incorporated in the judgment (Rec. p. 39).

From the judgment entered, pursuant to the above findings (Rec. p. 38), this appeal is prosecuted (Rec. p. 74).

SPECIFICATIONS OF ERROR

I.

Assignment of error No. 1 (Rec. p. 69) is addressed to the order (Rec. p. 27) denying appellant's motion to strike paragraph 4 of the affirmative answer and counter claim quoting the provision of the contract that grade No. 3 Common lumber shall not exceed 25% of the total cut and delivery, and the further provision estimating the lumber covered by the contract at 9,000,000 feet, board measure, more or less.

II.

Assignment of error No. 2 (Rec. p. 70) is addressed to the order (Rec. p. 27) overruling appellant's demurrer to appellee's affirmative answer and counter claim in the sum of $14,930.02 on account of alleged excess of No. 3 Common lumber above 25% of the total cut.

III.

Assignment of error No. 3 (Rec. p. 70) is addressed to the overruling by the trial court of appellant's objection, as irrelevant and immaterial, to the introduction of any testimony under the affirmative answer and counterclaim (Rec. p. 44, 48).

IV.

Assignment of error No. 4 (Rec. p. 70) is addressed to the overruling of appellant's objection, as incompetent, irrevalent and immaterial and not within the issues, to the testimony of A. W. Laird (Rec. p. 47, 48) as to the reasonable value of No. 3 Common White Pine lumber at Elk River, Idaho, during the years 1926, 1927, and 1928, as follows:

> "A. From 13 and one-half to $15, or $15.50. There was a little variation between the years.
> Q. Now, just apply that to the years, please. Take 1926.
> A. I would say in 1926 fifteen dollars and a half; in 1927 fourteen dollars and a half; in 1928 thirteen dollars and a half."

V.

Assignment of error No. 5 (Rec. p. 70) is addressed to the overruling of appellant's objection (Rec. p. 45, 46), as irrevalent and immaterial, to the introduction of testimony concerning the grades of lumber delivered to and accepted and received by appellee, and particularly to the testimony of appellee's witness, Hansen (Rec. p. 44, 45, 46), to the effect that of the total amount of lumber delivered the excess of No. 3 Common above 25% was 780,851 feet, on the ground that by such acceptance under the contract appellee waived all right to complain of the claimed excess of No. 3 Common lumber above 25% of the total delivery.

VI.

Assignment of error No. 6 (Rec. p. 70) is addressed to the holding and ruling that for No. 3 Common Idaho White Pine lumber accepted and received by appellee under its contract, in excess of 25% of the total cut and delivery, appellant was not entitled to receive and appellee was not obliged to pay in excess of the current market price prevailing in the years in which the deliveries were made.

VII.

Assignment of error No. 7 (Rec. p. 70) is addressed to the holding that the evidence introduced by and on behalf of appellant was legally insufficient to justify or sustain the judgment in their favor in accordance with the prayer of the complaint but that the recovery was subject to appellants' counterclaim.

VIII.

Assignment of error No. 8 (Rec. p. 71) is addressed to the holding that the evidence introduced by and on behalf of appellee was legally sufficient to justify and sustain the further answer and counterclaim.

IX.

Assignment of error No. 9 (Rec. p. 71) is addressed to the entry of special finding No. 2 (Rec. p. 35)

that of the total amount of lumber delivered by appellants to appellee 2,299,971 feet, board measure, was Grade No. 3 Common Rough Idaho White Pine lumber.

X.

Assignment of error No. 10 (Rec. p. 71) is addressed to the entry of special finding No. 5 (Rec. p. 36) that appellants delivered to appellee and appellee received 780,851 feet, board measure, of Grade No. 3 Common Rough Idaho White Pine lumber in excess of 25% of the total amount of lumber cut and delivered.

XI.

Assignment of error No. 11 (Rec. p. 71) is addressed to special finding No. 6 (Rec. p. 36) that the excess of 780,851 feet of Grade No. 3 Common lumber was delivered as follows:

In the year 1926, 149,293 feet;
In the year 1927, 321,723 feet;
In the year 1928, 309,843 feet.

XII.

Assignment of error No. 12 (Rec. p. 72) is addressed to special finding No. 7 (Rec. p. 36) that the market value of the excess of Grade No. 3 Common lumber at the place of delivery was

"In the year 1926 the sum of $15.50 per thousand feet board measure;

In the year 1927 the sum of $14.50 per thousand feet board measure;

In the year 1928 the sum of $13.50 per thousand feet board measure."

XIII.

Assignment of error No. 13 (Rec. p. 72) is addressed to special finding No. 8 (Rec. p. 36) that the difference between the market value of the excess of Grade No. 3 Common lumber delivered and the contract price is the sum of $14,216.02.

XIV.

Assignment of error No. 14 (Rec. p. 72) is addressed to special finding No. 9 (Rec. p. 37) that appellee is entitled to set off against the demand of appellants the said sum of $14,216.02 as a counterclaim.

XV.

Assignment of error No. 15 (Rec. p. 72) is addressed to the finding and holding in the final judgment entered below (Rec. p. 38) that appellants are not entitled to recover from appellee on the cause of action stated in their complaint in the sum of $15,308.21.

XVI.

Assignment of error No. 16 (Rec. p. 73) is addressed to the finding and holding in the final judgment entered below (Rec. p. 38) that appellee is entitled to recover from appellants on its counterclaim the sum of $14,216.02, and that it is entitled to have said amount set off against the demand of appellants.

XVII.

Assignment of error No. 17 (Rec. p. 73) is addressed to the finding and holding in the final judgment entered below (Rec. p. 38) that appellants are only entitled to recover of and from appellee the sum of $1,092.19, with interest thereon at the rate of 6% per annum from the 12th day of August, 1928, amounting to $104.66, aggregating the sum of $1,196.85, and their costs and disbursements herein expended, with interest on the judgment at the rate of 6% per annum from the date of entry.

XVIII.

Assignment of error No. 18 (Rec. p. 73) is addressed to the making and entering of the final judgment from which this appeal is prosecuted (Rec. p. 38) in that appellants should have been thereby awarded the sum of $15,308.21, with interest at the legal rate from the 12th day of August, 1928, as prayed in their complaint, without any offset, counterclaim or reduction in favor of appellee.

ARGUMENT

Questions of law only are at issue and their solution must be found in the construction to be placed on the contract between the parties and the acts of appellee thereunder. It follows that whatever may be said in support of any specification of error applies, with the exception of No. 8, equally to all. It is believed, therefore, that the presentation may be facilitated by considering the several specifications of error as a group, without any attempt at separate discussion.

I.

NO WARRANTY

The contract is executory in form and the sale of lumber was not in *praesenti*, since it stipulates

> "That the parties of the first part hereby *agree to sell* to second party."

certain lumber to be thereafter manufactured, pursuant to specifications and subject to inspection and rejection by appellee at the point of delivery.

Since title did not pass prior to acceptance, following inspection, there was no warranty, either express or implied, as to the grade or quality of the lumber, and the specification as to grade was a mere condition precedent.

> "As said by the federal supreme court (*Pope vs. Allis,* 115 U. S. 363, 9 L. ed. 393), where the subject matter of a sale is not in existence or not ascertained at the time of the contract, an undertaking that it shall, when existing or ascertained, possess certain qualities is not a mere warranty, but a condition, the performance of which is precedent to any obligation on the buyer under the contract; because the existence of those qualities, being a part of the description of the thing sold, becomes essential to its identity, and the buyer cannot be obliged to receive and pay for a thing different from that for which he contracted."
> 24 R. C. L. 290, Sec. 572.

Williston on Sales (2 ed.), Sec. 234, thus states the rule,

> "It is rightly held that ordinarily where the buyer has no opportunity to inspect goods, there should be no warranty implied as to defects which the examination ought to disclose, for the basis of implied warranty is justifiable reliance of the buyer upon the seller's judgment."

The Supreme Court of Washington in the well considered case of *Hurley-Mason Co. vs. Stebbins, Walker & Spinning,* 79 Wash. 366, 374, 376, 140 Pac. 381, Ann. Cas. 1916A 948, L. R. A. 1915B, 1131, held,

> "The sale being subject to the tests, if the material delivered did not meet the tests, then there was to be no sale. This is a very different thing from a collateral undertaking that all cement delivered should meet the tests. A sale subject to ininspection should never be construed as a warranty against defects which the inspection con-

templated would disclose. * * * Where an executory sale is made with the provision that the article is subject to inspection, whether written into the contract or implied from the custom of the trade, such a provision is held by what we conceive to be the better considered authorities a condition precedent and not a warranty."

To the same effect, we quote from the Nebraska case of *Patrick vs. Norfolk Lbr. Co.,* 115 N. W. 780, 782,

> "As said by Mr. Justice O'Brien in *Carleton vs. Lombard,* 149 N. Y. 137, 43 N. E. 422, and quoted with approval by Mr. Justice Bartlett in *Waeber vs. Talbot,* 167 N. Y. 48, 60 N. E. 288, 82 Am. St. Rep. 712, 717, that words of description are not considered as a warranty at all; but conditions precedent to any obligation on the part of the vendee, since the existence of the qualities indicated by the descriptive words, being part of the description of the thing sold, become essential to its identity, and the vendee cannot be obligated to receive and pay for a thing different from that for which he contracted. * * * The tendency of the recent decisions in this court is to treat such words as part of the contract of sale descriptive of the article sold and to be delivered in the future and not as constituting that collateral obligation which sometimes accompanies a contract of sale and known as a warranty.' * * * And, if without notice or complaint to plaintiff they took the course they did of hauling the posts to their yard, and selling part of them to the trade, for a period of some 50 days, they are without standing in court."

To the same effect,

Jones vs. McEwan (Ky.), 16 S. W. 81;

Naeber vs. Talbott (N. Y.), 60 N. E. 288;

Allegrezza vs. Sculcucci (Mich.), 225 N. W. 495;

Lieblein vs. Isbell Bean Co. (Mich.), 172 N. W. 388;

Williams vs. Robb (Mich.), 62 N. W. 352;

Florida Athletic Club vs. Hope Lumber Co., 44 S. W. 10;

Smith vs. New Albany Rail Mill Co. (Ark.), 6 S. W. 225;

Iowa Gas & Elec. Co. vs. Wallins Creek Coal Co. (Ky.), 1 S. W. (2d.) 1056;

Patrick vs. Norfolk Lbr. Co. (Neb.), 115 N. W. 780;

Horn vs. Elgin Warehouse Co. (Ore.), 190 Pac. 151;

Henderson Elev. Co. vs. North Georgia Mill Co. (Ga.), 55 S. E. 50;

Benjamin on Sales, Sec. 690.

Obviously no form of warranty inhered in the transaction. In this connection we again turn to the contract.

"Second party shall pay * * * for such lumber as shall have been delivered during the preceding calendar month, as herein specified, according to the scale bill rendered by the scaler or grader as herein provided, such payments * * * to be made monthly on or before the eighth day of the calendar month following delivery."

"Said grader or scaler shall inspect and grade all lumber covered by this contract. * * * *It is further agreed that the scale and accounts rendered by such grader or scaler shall be final and binding upon each of the parties to this contract.*"

"First parties (appellants) further agree to remove from the lumber yard of the party of the second part, at their own cost and expense, and within a reasonable time, not exceeding seven days from date of rejection by grader, all lumber which is not up to grade or in accordance with the specifications as herein specified and is, therefore, rejected by the second party. *Rejection shall be deemed automatically made by second party at time of grading.*"

In the absence of a warranty as to grade or quality it is too clear for serious argument that, in the circumstances disclosed by the record, appellee has no ground for offset against appellants' demand for payment of the full stipulated purchase price. As said by this court, speaking through Judge Wolverton, in *Lewiston Mill Co. vs. Cardiff*, 266 Fed. 753, 764,

"It must be conceded, however, that where the sale is by sample and there has been an acceptance after inspection of the commodity, or there has been reasonable opportunity for inspection, either before or after delivery, to determine

whether commodity conformed to the sample, the sale is concluded, and the vendee is bound by his contract of purchase; and while it may be said that an implied warranty of kind and quality accompanies the purchase, there must be a time when the controversy comes to an end, and it is unreasonable and unusual for the purchaser to insist that, at any time after acceptance however remote, he has a right to resort to the warranty for recoupment of damages. The principle should not be lost sight of that, where the commodity conforms to the sample, there is complete performance of the contract of sale."

From the 4th Circuit case of *Johnston Mfg. Co. vs. Wilson Thread Co.,* 269 Fed. 555, 557, we quote

"The general rule is that, if before acceptance of goods material variance from the quality contracted for is so obvious that the purchaser has observed it, or by ordinary inspection would have observed it, and nevertheless accepted the goods, he will be held to have waived the variance from the quality he was entitled to demand. *Supply Co. vs. Jones,* 87 S. C. 428, 69 S. E. 881; *Woods vs. Cramer,* 34 S. C. 508, 13 S. E. 660; *Brooke vs. Milling Co.,* 78 S. C. 200, 58 S. E. 806, 125 Am. St. Rep. 780; *Thornton vs. Wynn,* 12 Wheat. 183, 6 L. ed. 595; *Miller vs. Tiffany,* 1 Wall. 298, 309, 17 L. ed. 540; *Dewey vs. West Fairmount Gas Coal Co.,* 123 U. S. 329, 8 Sup. Ct. 148, 31 L. ed. 179, 23 R. C. L. 263, 274, and cases cited."

Likewise the following from the 2nd Circuit case of *Cudahy Packing Co. vs. Narzisenfeld,* 3 Fed. (2 ed.) 567, 570,

> "The maxim of *caveat emptor* embodies an ancient rule of the common law. It is based on the principle that the purchaser buys at his own risk unless the seller gives an express warranty or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in a material inducement to the sale. Under it the buyer is put upon his guard and must stand the loss of an imprudent purchase unless the soundness of the thing bought is warranted by the seller. It applies to sales of personalty where the buyer has an opportunity to inspect the goods and the seller is guilty of no fraud.

To quote again from the leading case of *Hurley-Mason Co. vs. Stebbins, Walker & Spinning,* supra.

> "It seems to us a sound rule, deducible from the authorities, that, where an executory sale is made subject to inspection, an acceptance by the buyer, with or without inspection and without notice to the seller of any defects or offer to return, is a waiver of any claim for damages on account of defects which might have been discovered upon inspection by any ordinary tests or by the tests prescribed by the contract, in the absence of an express warranty intended to survive acceptance."

As logically expressed in the leading New York case of *Pierson vs. Crooks,* 22 N. E. 349, 350,

> "If he (the seller) tenders articles of an inferior quality, the purchaser is not bound to accept them. But if he does accept them, he is, in the absence of fraud, deemed to have assented that

they correspond with the description, and is concluded from subsequently questioning it. This imposes upon the vendee the duty of inspection before acceptance, if he desires to save his rights in case the goods are of inferior quality. There is in such case no warranty of quality which survives acceptance, and the vendee cannot reject the goods after acceptance or recover damages for inferior quality. He can do nothing inconsistent with the right of rejection, or do what is only consistent with acceptance and ownership, without precluding himself."

Equally in point is the language in *Florida Athletic Club vs. Hope Lumber Co.,* 44 S. W. 10, 13,

> "The contract for the sale and delivery of the lumber was an executory one. The title to the lumber did not pass until there was a delivery. The contract stipulated that the lumber was to be 'No. 1 mill run, Texas pine, of first-class quality, free from knots or shakes that would impair its strength or durability.' There was no other provision in the contract as to the grade or quality of the lumber. We understand the rule to be that, where there is a sale of personal property to be delivered, and no express warranty that would survive delivery, upon the delivery with an opportunity to examine the same, and an acceptance, the vendee cannot complain as to visible defects therein, but will be held for the contract price."

Also,

Barnard vs. Kellogg, 10 Wall, 383, 19 L. ed. 987;

Dorsey vs. Watkins, 151 Fed. 340;

Job vs. Heidritter Lbr. Co., 255 Fed. 311, 312; 3 A. L. R. 619.

Carleton vs. Jenks, 80 Fed. 937, 940;

McDonald vs. Kansas City Bolt & Nut Co., 149 Fed. 360, 364.

Furthermore, it is expressly provided by statute in Idaho, Idaho Comp. Stat. 1919, Sec. 5687, Par. 3,

> "If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.' '

Identical statutes in Massachusetts, New York and Michigan, have been held not to change the common law rule.

Bradt vs. Holloway, 136 N. E. 254;

Rosenbush vs. Larned, 126 N. E. 341;

Bonwit, Teller Co. vs. Kinlen, 165 N. Y. App. D 351, 150 N. Y. S. 966;

Rubin vs. Crowley, Millner & Co., 183 N. W. 51;

Hunt vs. W. F. Hurd Co., 171 N. W. 373;

American Varnish Co. vs. Globe Furn. Co., 165 N. W. 1050.

II.

WARRANTY, IF ANY, WAIVED BY ACCEPTANCE

Even should it be found that the contract of sale included a warranty, most authorities hold that in the absence of fraud no form of warranty will survive, with respect to obvious defects, inspection and acceptance.

Columbus etc. Iron Co. vs. See, 135 N. W. 920;

Marmet Coal Co. vs. Peoples Coal Co., 226 Fed. 646;

Gill vs. Nat'l Gas Light Co., 137 N. W. 690;

Forsythe vs. Russell Co., 146 S. W. 1103;

Bray vs. Southern Iron etc. Co., 113 S. E. 55;

Kenniston vs. Todd, 117 N. W. 674;

Henderson Elev. Co. vs. North Georgia Mill Co. 55 S. E. 50;

Buick Motor Co. vs. Reid Mfg. Co., 113 N. W. 591;

Rosenfield vs. Swenson, 47 N. W. 718;

Stilwell Co. vs. Biloxi Co., 29 So. 513;

Patrick vs. Norfolk Lbr. Co., 115 N. W. 780;

Northfield Nat'l Bank vs. Arndt, 112 N. W. 451;

Hurley-Mason Co. vs. Stebbins, Walker & Spinning, 79 Wash. 366, 140 Pac. 381.

In the light of the above language of the contract, becomes important Sec. 5721 of the 1919 Comp. Stat. of Idaho, providing,

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know such breach, the seller shall not be liable therefor."

Clearly, it seems to us, the provision of the contract for rejection by appellee, and requiring removal by appellants from appellee's lumber yard, of all rejected lumber within seven days from the date of rejection, together with the further provision for payment of the contract price for all lumber delivered, on or before the eighth day of each calendar month following delivery, is an express agreement of the character contemplated by the first sentence of the above quoted statute and of itself, regardless of general rules of law, precludes a counter claim on account of the alleged excess of

No. 3 Common lumber received and accepted by appellee subsequently to inspection. By failing to reject, pursuant to the contract, the lumber now claimed to have been below grade, appellant must, under Sec. 5721 of the Idaho code, be held to have waived all grounds for complaint or legal redress.

This contention is strongly sustained by the Michigan case of

> *Rubin vs. Crowley, Millner & Co.,* 183 N. W. 51,

holding that retention by the purchaser of goods not in conformity with specifications rendered the buyer liable for the full purchase price, notwithstanding the Uniform Sales Act which embraces the above quoted Idaho statute. After referring to the Uniform Sales Act, the court said,

> "The parties by their contract had provided in advance for precisely the situation which arose, and had expressly agreed upon what should be done by each in case of that contingency. If the goods were different from the sample or specification, defendant agreed to return them at shipper's expense, and plaintiff agreed to receive them. This by the agreement, was the measure of their liability. The case upon principle is controlled by *Hunt vs. W. F. Hurd Co.,* 205 Mich. 142, 171 N. W. 373. In that case a contract was entered into for the sale and shipment of lumber of a certain grade, the entire shipment was to be held intact,

and the seller notified within five days. Some of the lumber was not up to grade. Defendant stored it, and in his defense of an action brought to recover the full contract price sought to invoke the provisions of the Uniform Sales Act (section 11875, C. L. 1915, subd. 4). We there said:

> 'The difficulty we encounter in attempting to follow counsels' line of reasoning lies in the fact that we here have a special agreement between the parties. It cannot be doubted that at common law the parties had the right to contract; nor can it be claimed that the Legislature by the Uniform Sales Act has attempted to take away such right. In subdivision 4 of the section of the act relied upon by defendant's counsel it is expressly provided: 'The provisions of this section are subject to any usage of trade, special agreement, or course of dealing between the parties.' "

III.

APPELLEE'S CONTENTIONS

The burden of the argument below on behalf of appellee, likewise the opinion of the trial court expressed from the bench (Rec. p. 50), appeared to be based, without regard to other provisions of the contract, exclusively on the proviso (Rec. p. 7)

> "* * * that Grade No. 3 Common shall not exceed 25% of the total cut and delivery;"

the deduction being that it was necessary to accept all lumber offered, regardless of the grade, since it was

not possible to know whether an excess of No. 3 Common in the early deliveries might not be equalized or reduced to the stipulated 25% of the total in the course of subsequent deliveries.

This argument is falacious and does not bear scrutiny. The first premise appears to be that more than 75% of a better grade than No. 3 Common would be fatal, at least not permissible, under the contract. Such construction is not only inconsistent with the contract as a whole, but is squarely at variance with the wording of the clause in question,

> "* * * Grade No. 3 Common *shall not exceed* 25% of the total cut and delivery."

Obviously a deficiency in No. 3 Common is not penalized. The only requirement, on the other hand, is that No. 3 Common shall not exceed 25% of the total.

Just as clearly, the provision that of

> "* * * all lumber which is not up to grade or in accordance with the specifications, * * * rejection shall be deemed automatically made by second party at time of grading,"

and the further provision for monthly payments of the full purchase price for all lumber previously delivered, require that the contract be construed as severable, month by month, with respect to the deliveries for

which appellee, on acceptance after inspection, was required to make payment.

Even could the language of the contract be reasonably construed as requiring that No. 3 Common should, at the conclusion of the contract, be in no event less than 25% of the total, it is nevertheless perfectly apparent that appellants could have provided against any deficiency in that regard by the simple process of piling and preserving sufficient of the early excess of No. 3 Common for later delivery in the event of such a contingency. Certainly such construction would be more reasonable and would work out more satisfactorily in the end than the holding of the trial court that acceptance of all lumber offered was obligatory, however much No. 3 Common might exceed the stipulated 25% and regardless of the requirement that inferior grades be rejected. That construction interpolates into the contract and imposes on appellants an obligation to accept for any excess of No. 3 Common on appellee's grading, the prevailing market price for that grade of lumber. Such construction does violence, we submit, to the entire contract, which should be considered as whole, and reads into it a radical covenant which it is reasonable to assume that the parties would have incorporated in writing had such been their purpose.

The elementary proposition that courts cannot add to or rewrite contracts but must accept and enforce them as made by the parties is, we contend, violated by the holdings in that regard of the trial court. As said in 13 C. J., 525, Sec. 485,

> "It is not the province of the court to alter a contract by construction or to make a new contract for the parties; its duty is confined to the interpretation of the one which they have made for themselves, without regard to its wisdom or folly, as the court cannot supply material stipulations or read into the contract words which it does not contain."

Also,

> *Hearin vs. Standard Life Ins. Co.,* 8 Fed. (2d.) 202;
>
> *Sorenson vs. Larue* (Ida.), 252 Pac. 494.

Likewise important at this point is the equally elementary rule stated in Sec. 486, p. 525, of the same volume, that

> "A contract must be construed as a whole, and the intention of the parties is to be collected from the entire instrument and not from detached portions, it being necessary to consider all of its parts in order to determine the meaning of any particular part as well as of the whole."

IV.

NOTICE NOT GIVEN BY APPELLEE

As noted in our opening statement, there was neither proof nor pretense of testimony that notice was at any time given to appellants of the excess above 25% of No. 3 Common lumber, as required by Sec. 5721 of the 1919 Comp. Stat. of Idaho, as a condition precedent to the recovery of damages for breach of warranty on the sale of personal property. This statute, for the convenience of the court, we again quote in full.

> "In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But if, after acceptance of the goods, the buyer fails to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know such breach, the seller shall not be liable therefor."

This section of the Idaho statute is a standard provision of the Uniform Sales Act, and the notice thereby required has been uniformly held, in every jurisdiction where the question has arisen, to be an indispensible condition precedent in the absence of which the buyer is entirely without remedy or standing in

court with regard to any alleged breach in the quality or grade of property theretofore received and accepted.

That appellee appreciated the necessity for such notice is established by the allegation in Paragraph 7 of its affirmative answer and counterclaim (Rec. p. 25)

> "That defendant thereupon immediately and within a reasonable time after learning of such breach, to-wit, on September 18, 1928, gave notice to the plaintiffs in writing that they had breached said express warranty by delivering an excess of grade No. 3 Common lumber in violation thereof."

Hence, it follows, even though all other contentions on behalf of appellants should be rejected, that appellee, by its failure to give the required notice waived any and all grounds for complaint on account of the alleged excess of No. 3 Common lumber, and has no standing in court with respect to its counter-demand.

As said in *Marmet Coal Co. vs. People's Coal Co.*, 226 Fed. 646, 651, with respect to an identical statute,

> "Again, unless defendant gave notice of the alleged breach within a reasonable time after it knew it, defendant has no right of action and no defense. Ohio Code, 8429."

To the same effect,

Block vs. Eastern Mach. Screw Corp., 281 Fed. 777;

United States vs. Dewart Milk Products Co., 300 Fed. 448;

Knobel vs. Bartel Co., 187 N. W. 188;

Massey-Hollis Co. vs. Burnett, 268 Pac. 740;

Williamsburg Stopper Co. vs. Bickart, 134 At. 233;

Hutchinson vs. Renner, 162 N. E. 45;

Nashua River Co. vs. Lindsay, 144 N. E. 224;

Rothenberg vs. Shapiro, 140 N. Y. S. 148;

Regina Co. vs. Gately Furn. Co., 157 N. Y. S. 746;

Eagle vs. Sternberg, 191 N. Y. S. 800;

Canada Maple Exchange vs. Scudder Syrup Co., 223 Ill. App. 165;

Bass vs. Bellofatto, 96 N. J. L. 320, 115 Atl. 302;

Tinsley vs. Gullett Gin Co., 94 S. E. 892.

Respectfully submitted,

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and

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